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COUNTER-REJOINDER:
JUSTICE VS. JUSTICIABILITY?: NORMATIVE
NEUTRALITY AND TECHNICAL PRECISION, THE
ROLE OF THE LAWYER IN SUPRANATIONAL
SOCIAL RIGHTS LITIGATION

TARA J. MELISH*

I. INTRODUCTION

This issue of the *N.Y.U. Journal of International Law and Politics* is host to an important debate currently underway in the inter-American human rights system on the proper approach litigators, adjudicators, and advocates should take to supranational litigation of economic, social, and cultural rights. As the President of the Inter-American Court of Human Rights has affirmed, the jurisprudential development of these rights, including under article 26 of the American Convention on Human Rights, is “one of the most current and transcendent issues in the human rights system in our region.”¹ The President of the Inter-American Commission on Human Rights has likewise recognized the effective protection of economic, social, and cultural rights as one of the “foremost challenges” the regional human rights system must now confront.²

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1. “Five Pensioners” Case v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003) (García Ramírez, J. concurring) (“El tema [del artículo 26] sugiere, como es evidente, muchas consideraciones adicionales que traerá consigo el desarrollo de la jurisprudencia interamericana sobre una de las cuestiones más actuales y trascendentes en el sistema de los derechos humanos en nuestra región.”) [hereinafter *Five Pensioners Case*].

2. Dr. Clare K. Roberts, President, Inter-Am. Comm’n on Human Rights, Presentation of the 2004 Annual Report of the Inter-American Commission on Human Rights to the Committee on Juridical and Political Affairs

There are two important framework points to underscore at the outset. The first is that wherever any particular advocate, practitioner, or scholar happens to fall within this debate, her conviction and commitment to the integrity of the system, the advance of human rights, and the protection of victims from abuse is never open to question. Fortunately, this is a core characteristic of those who work in our field. Second, the debate in which we are engaged is, in many ways, a very technical one, centered on questions of jurisdiction and the proper characterization and limits of justiciability. Its resolution has tremendous implications for the tools available to on-the-ground advocates, their real-world effectiveness and sustainability in adjudicatory and advocacy contexts alike, and the rationalization of the system's developing jurisprudence over the long-term.

The debate turns on two principal issues. The first is whether litigants, in framing their cases, should limit to a certain subset the universe of rights-based norms otherwise jurisdictionally available to them for purposes of litigating human rights claims. Most notably, should the spectrum of social rights recognized autonomously in article 26 of the American Convention be excluded *a priori*? The second, in many ways the predicate to the first, relates to the proper characterization of the legal duties that apply to the system's universe of guaranteed rights. It has two parts: One, whether the legal obligations that attach to norms classically characterized as civil-political rights differ in judicially cognizable ways from those classically characterized as social rights; and, two, given traditional stereotypes that *do* recognize duty-based differences between these abstract categories of rights, whether litigants should prefer accommodation, accepting those entrenched stereotypes as the basis of their litigation strategies, or whether they should adopt a corrective strategy that aims to rationalize the jurisprudence and to bring it into conformity with the adjudicatory system's long-standing rules on admissibility and jurisdiction.

The two preceding articles in this issue take largely opposing views on both of these issues. One focuses on short-term, narrow wins in the inter-American system within a limited set

of the Permanent Council of the Organization of American States (Apr. 15, 2005) (the rule of law being the other foremost challenge).

of rights and classic stereotypes of duties. The other looks to the long-term sustainability of the system's case-based jurisprudence by seeking to promote rationality and effectiveness in the adjudication of *all* rights, through proper duty-based adjudicatory standards and attention to the limits of system-specific justiciability doctrine. The first article, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*,³ was prepared as a response to an earlier publication by James L. Cavallaro and Emily J. Schaffer, entitled *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*.⁴ The Cavallaro-Schaffer piece set forth a "less as more" thesis that included, as one of two central sub-theses,⁵ a view that litigants should a priori prefer reliance on civil and political rights norms to norms autonomously guaranteeing economic, social, and cultural rights. They justified this norm-based preference on a jurisdictional basis: Namely, that the latter set of rights are judicially "unenforceable" given their lack of "concrete duties" and "definite grounds for state responsibility."⁶ They contrasted these "unenforceable" rights with "*justiciable* civil-political rights,"

3. 39 N.Y.U. J. INT'L L. & POL. 171 (2006) [hereinafter *Rethinking*].

4. James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2005) [hereinafter *Less as More*].

5. *Rethinking* carefully divided Cavallaro and Schaffer's *Less as More* argument into Thesis I and Thesis II, directing its own arguments only to the latter with respect to the authors' technical characterization of "justiciability," "jurisdiction," and "legitimacy" in the inter-American system, characterizations which laid the basis for their overall conclusion that direct approaches to supranational social rights litigation should be avoided. See *Rethinking*, *supra* note 3, at 183-204 (discussing Cavallaro-Schaffer "Thesis I" and "Thesis II"). In stating in their rejoinder that I mischaracterize their thesis, they nonetheless reassert precisely the part of their thesis that I did not contest. See James L. Cavallaro & Emily Schaffer, Rejoinder: *Justice Before Justiciability: Inter-American Litigation and Social Change*, 39 N.Y.U. J. INT'L L. & POL. 345, at 345, 349 (2006) [hereinafter *Rejoinder*]. Any divergence in our views on this relates not to the shared ideal of an "incremental" approach to litigation "firmly grounded in established precedent," but rather to differing visions of what that means and, particularly, whether it departs from a principally norm-based or claim-based understanding. *Id.* Within this context, Part V of *Rejoinder* as well as the repeated insistence that I misunderstand the importance of listening to social movements is not responsive to the actual arguments set forth in *Rethinking*.

6. See *Less as More*, *supra* note 4, at 225, 267 & 268.

characterized by immediately enforceable duties and, hence, legitimacy for litigation.⁷

It was this conceptual framework—especially its reliance on traditional duty-based stereotypes of rights, its conflation of distinct legal concepts such as “judicial enforceability,” “justiciability,” and “legitimacy,” and the technical-jurisdictional errors in the hypothetical test cases commended to litigants—that prompted *Rethinking*. *Rethinking* sought both to disentangle the conceptual terms, distinguishing *norm*-based subject matter jurisdiction and *claim*-based justiciability as separate aspects of judicial enforceability, and to shift the focus of litigation strategy away from rights-based stereotypes toward the technically adjudicable dimensions of treaty-based human rights obligations, as determined by system-specific justiciability doctrine.⁸ Only in this way, *Rethinking* argued, may we ensure the big-picture stability, rationality, and long-term sustainability of social-rights litigation in the inter-American system and, hence, its *usefulness* to larger social movement advocacy and social justice agendas.

Cavallaro and Schaffer’s rejoinder characterizes the debate in different terms. Setting up a false dichotomy between those who privilege detached “jurisprudential development of ESC rights themselves” and those who “favor social justice,”⁹ it concludes that the “tension between our approaches centers on the role of supranational litigation in promoting social jus-

7. See *id.* at 263 (emphasis added). *Rejoinder* insists that *Less as More* “does not question the justiciability of ESC rights in principle.” *Rejoinder*, *supra* note 5, at 107 (emphasis in original). Yet, given the latter’s assertion that “ESC rights” lack “immediately enforceable” obligations, “concrete duties,” and “definite grounds for state responsibility,” see *Less as More*, *supra* note 4, at 225, 267, 268—characteristics that, if true, would render corresponding claims non-justiciable—the authors’ definition of “justiciability” is not clear. It was for this reason that *Rethinking* sought to separate, and assess in discrete sections, the distinct concepts of subject-matter jurisdiction, justiciability, and legitimacy in the inter-American system. See *Rethinking*, *supra* note 3, Part III.

8. *Rethinking*, *supra* note 3, at 204-286. *Rejoinder* continues to assert that “the instruments and caselaw of the inter-American system recognize differences in the *justiciability* of civil and political and economic, social and cultural rights.” *Rejoinder*, *supra* note 5, at 351 n.15 (emphasis added). This view fails to appreciate the point underscored in *Rethinking* that justiciability doctrine relates not to abstract *rights*, but rather to the scope of the *claims* framed under them.

9. *Rejoinder*, *supra* note 5, at 368, 382.

tice.”¹⁰ In making this contention, and in repeatedly pitting “justice” against “justiciability,” a rhetorical fence is erected that is unhelpful in finding common ground on these important issues.¹¹ Most importantly, however, it manufactures conflict around an issue that decidedly was never part of the debate. As underscored in *Rethinking*, the debate in which we are engaged is not whether advocates should listen to and take their primary cues from broader social movements, a view that all participants in this debate share. Nor is it a debate on the extent to which litigation drives social movements or social movements drive litigation, a largely circular question that has complex answers in distinct contexts.¹² It is a debate about the proper role and responsibility of the supranational lawyer—especially experienced ones, who may be viewed by local advocates as authorities on how best to make use of the system’s procedures—in counseling victim communities about the full range of possibilities open to them, and the proper limits of the system’s adjudicatory function in achieving distinct aspects of larger social justice agendas.

Indeed, as reaffirmed throughout *Rethinking*, especially in Part VII, the strategic choices about how to focus a particular litigation campaign must be made through informed and active discussions among all parties so that litigation effectively

10. *Id.* at 345. Cavallaro and Schaffer go so far as to say that “Melish attacks us for viewing litigation as part of a strategy designed to promote social justice” and that “she discourages practitioners from employing the contentious jurisdiction of the Commission and Court to promote social justice.” *Id.* at 353, 369 n.61. Readers are invited to review what was actually said at the pages they cite. The corresponding analysis, titled “Distinguishing the Adjudicatory from Promotional Functions of Supranational Organs,” aims to distinguish the narrow subset of claims that are cognizable under adjudicatory procedures as a function of justiciability doctrine from the far larger set of “social justice” claims—including many of Cavallaro and Schaffer’s recommended hypothetical test cases—that are non-cognizable under adjudicatory process and hence properly reserved for the inter-American organs’ promotional competence—i.e., “the proper forum for generally ‘promoting social justice’ in the regional human rights system.” *Rethinking*, *supra* note 3, at 368 (emphasis added).

11. See *Rejoinder*, *supra* note 5, at 345 (“Justice Before Justiciability”). The distinction is unavailing in litigation contexts, the focus of this debate, given that justiciability is a jurisdictional threshold to accessing the adjudicatory function.

12. *Rejoinder* appears to aim to refocus the debate on these issues. *Id.* at 368-70.

fits within larger social movement campaigns. In this regard, the role of lawyers should not be in limiting litigation options a priori, but in explaining, in normatively-neutral and technically-precise ways, the full set of tools available to local groups and allowing *them* to decide their preferred strategic course based on their own self-assessed needs, priorities, and visions for their struggle. There is, in this sense, an unmistakable irony in the two sub-theses of Cavallaro and Schaffer's work: The insistence that lawyers "listen to" and "take cues" from social movements regarding litigation strategy and, concurrently, that they should, if they "care about social justice," a priori prefer one sub-set of jurisdictionally-appropriate norms over another.¹³

After laying out the general context of the larger debate in which the above arguments are ensconced, the remainder of this Counter-rejoinder is directed to the two central arguments put forth by Cavallaro and Schaffer in their rejoinder. The first relates to their continuing arguments on why litigants should avoid article 26. The second addresses the "is" versus "ought" distinction they highlight, specifically the preference indicated for accommodationist over corrective approaches to supranational litigation. In the course of these discussions, certain things attributed to *Rethinking* that were not endorsed therein will also be underscored, such as any assertion that litigants should avoid the right to life as a case-framing mechanism in their litigation strategies.

II. CONTEXT: THREE DISTINCT POSITIONS AMONG RIGHTS ADVOCATES

The larger debate to which the views in this issue belong has many shades and splinters, but it can fairly be characterized as having three core positions, two of which are represented by the articles in this issue. For purposes of context, each is roughly described here. The first position ("Position I"), the eldest and most entrenched, is represented by Cavallaro and Schaffer in *Less as More* and *Rejoinder*. It contends that civil and political rights should a priori be preferred in litigation initiatives given historic rights-based stereotypes that

13. Both sub-theses appear prominently in *Less as More* and *Rejoinder*. See generally *Less as More*, *supra* note 4; *Rejoinder*, *supra* note 5.

influence the understandings of actors within the system. Advocates of this view offer different reasons for their normative preference and take different views on the expansiveness of interpretations to be granted to classic civil-political rights norms.¹⁴ They share a focus nonetheless on classic civil-political rights as the basis for litigation and generally promote the view that, while all rights may have negative and positive aspects, civil and political rights are *immediate* while economic, social, and cultural rights are *progressive*. This distinction defines these rights' respective adjudicability.¹⁵

The second position ("Position II"), the most widely held at present among self-described social rights advocates, insists that, unlike Position I, no norm-based preference should a priori be made in litigation. Rather, litigants should have the freedom to choose, from among all jurisdictionally-appropriate civil, cultural, economic, political, and social norms, the specific ones that best meet their self-defined strategic needs under the circumstances. Position II nonetheless shares with its predecessor classic assumptions regarding *legal obligations*. That is, it assumes constitutive differences between the legal duties that attach under human rights law to civil-political rights and to economic-social-cultural rights—the former char-

14. Cavallaro and Schaffer defend an "elements approach," defined as "constru[ing] classic civil and political rights expansively so as to include economic, social or cultural elements." *Less as More*, *supra* note 4, at 258. Because their broadly-defined terminology includes several discrete approaches within its canopy, each with very different implications for both social rights litigation and the internal consistency of their overall thesis, *Rethinking* divides it into elements approaches "I," "II," and "III." See *Rethinking*, *supra* note 3, at 193-98. The latter two approaches correspond to what have elsewhere been termed an "integration" and "indirect" approach to social rights litigation. *Id.* at 193-95 (citing *PROTECTING*, *infra* note 18, at 193-332).

15. As pointed out in *Rethinking*, while Cavallaro and Schaffer recognize that all rights have corresponding negative and positive dimensions, they focus on the immediate/progressive distinction to justify reliance on civil-political rights. *Rethinking*, *supra* note 3, at 197-99, 245 n.200, 255 n.229. They affirm that activists and policymakers have proved "incapable of imposing immediate obligations on states to protect and ensure economic, social, and cultural rights," *Less as More*, *supra* note 4, at 222, concluding that these rights lack "concrete duties" and "grounds for state responsibility." *Id.* at 225, 267. They reaffirm this in *Rejoinder* with respect to article 26, underscoring that the social rights norm "does not recognize individual immediately-justiciable rights." *Rejoinder*, *supra* note 5, at 360.

acterized by *immediacy*, the latter by *progressive realization*. Adherents of Position II have thus focused their collective energies on creating typologies and doctrines around the duty of progressive realization in an effort to isolate its “immediately enforceable” elements.¹⁶ They then apply one set of “immediately enforceable” obligations to social rights claims framed as classic civil-political rights and a *different* set to claims framed as classic social rights, even when both refer to the same factual claim and underlying injury.¹⁷

The third position (“Position III”), the newest and most technically minded, is represented by *Rethinking*.¹⁸ It shares the view of Position II that all norm-based choices in litigation should be made on an informed case-by-case basis by victims and local communities themselves, i.e., never on an a priori basis. It nonetheless rejects the shared underlying assumption of Positions I and II that the legal obligations attaching to classic sets of rights differ in judicially-cognizable ways. It insists that all human rights share the *same spectrum* of corresponding obligations, a fact confirmed by a textual and jurisprudential examination of core human rights instruments.¹⁹ Nonetheless, only certain dimensions of those shared obligations are

16. The most popular among Position II advocates at present are “minimum core content,” a “prohibition on regressivity,” and a division of the tripartite “respect, protect, fulfill” typology into immediate duties (respect and protect) and progressive ones (fulfill). See *Rethinking*, *supra* note 3, at 178 n.13. For the most recent compilation of Position II proponents’ views, see CHRISTIAN COURTIS (COMP.), *NI UN PASO ATRAS. LA PROHIBICION DE REGRESIVIDAD EN MATERIA DE DERECHOS SOCIALES* (Editores del Puerto-CEDAL-CELS, Buenos Aires, 2006).

17. This was the litigant position behind the *Five Pensioners Case*, *supra* note 1, a case that has catalyzed advocates of Positions I, II and III alike, albeit in radically different directions. See, e.g., *infra* note 94.

18. For the first basic articulation of Position III, see TARA MELISH, *PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS* 155-90, 335-47 (2002) [hereinafter *PROTECTING*]. *PROTECTING* argued that the Chapter I “general obligations” of the American Convention, as interpreted in the system’s longstanding jurisprudence, correspond equally to Chapter II and Chapter III rights and that litigants should make use of all Convention-based norms, as their individual cases warrant, without a priori norm-based distinctions. Although based on plain-text analysis of the Convention, the roots of this position extend to a separate vote of Judge Rodolfo E. Piza Escalante in a 1984 advisory opinion of the Court. See *id.* at 336-37; *Rethinking*, *supra* note 3, at 230 n.159.

19. See *Rethinking*, *supra* note 3, at 254-74.

amenable to adjudicatory process in supranational individual complaints procedures. Those adjudicable dimensions are determined not by reference to classic stereotypes of abstract rights and their corresponding duties, as Positions I and II assume, but rather by the specific *justiciability rules* of a given system—those that enable access to the adjudicatory function.

A four quadrant matrix was advanced in *Rethinking* to illustrate conceptually these adjudicable dimensions of human rights duties in the inter-American system.²⁰ Organized around the system's two core requirements for accessing the adjudicatory function—concrete individualized injury and conduct-based imputation to state agents of causal responsibility for that individualized harm²¹—it aims to isolate, in quadrant 1, the dimensions of human rights duties that the inter-American organs are competent to apply to any given case as a function of system-specific justiciability doctrine.²² These dimensions are then distinguished from those reflected in the typologies and doctrines relied upon in social rights litigation by advocates of Positions I and II.²³ Located in quadrants 2 and 4,²⁴ these latter dimensions fall outside the realm of a judicially cognizable case in the regional system. As such, they

20. See *id.* at 244-48. Although the matrix applies in parallel manner to other jurisdictional organs that define justiciability similarly, such as the European Court of Human Rights and the U.N. Human Rights Committee, it was designed specifically around the justiciability rules of the Inter-American Commission and Court of Human Rights. It is unsettling in this regard that Cavallaro and Schaffer view the matrix as relevant to, and designed for, future U.N. adjudicatory bodies, but not the inter-American organs. *Rejoinder*, *supra* note 5, at 355, 383.

21. See *Rethinking*, *supra* note 3, at 243-48.

22. Quadrant 1, reflecting the conduct-based, individual-oriented dimensions of human rights duties, corresponds to the duty to adopt all appropriate measures to respect and ensure guaranteed rights to individual rights-holders within a state's jurisdiction. See *id.* at 250-51.

23. Advocates of Position I generally apply quadrant 1 duties to claims framed under civil-political rights norms. Cavallaro and Schaffer, however, rely primarily on quadrant 2 duties in laying out their theory of state responsibility in their recommended test-case hypotheticals. See *Less as More*, *supra* note 4, at 274-80. The four-quadrant matrix aims to provide a principled, conceptual framework for explaining why their theory that the positive aspects of civil-political rights are immediately enforceable in their *result-based* dimensions is problematic in the inter-American system. See *Rethinking*, *supra* note 3, at 268-74, 297-300, 328-32.

24. Respectively, these quadrants refer to result-based, individual-oriented duties ("respect and ensure to individuals") and result-based, collec-

cannot properly ground state responsibility for human rights violations under the system's adjudicatory competence; claims invoking them will be dismissed as beyond the competence of the regional organs.²⁵ Consistent application of the litigation-appropriate dimensions of human rights duties (quadrant 1) to *all* rights-based claims, Position III argues, is the technically proper approach to supranational human rights litigation. Direct enforcement of the litigation-inappropriate dimensions, those reflecting quadrants 2, 3, and 4, should be reserved for the system's non-adjudicatory, promotional, and advisory competences in the first instance.²⁶

Each of the three core positions is currently being pressed and promoted in the inter-American system by distinct advocates and constituencies, through cases, hearings, meetings, publications, trainings, and other varied strategies. The Inter-American Commission and Court, undecided on which single course to take, are currently experimenting with all of them.²⁷

tive-oriented duties ("progressive achievement for the collective"). See *Rethinking*, *supra* note 3, at 251.

25. It is for this reason, Position III asserts, that application of Position II in practice leads to the same normative result advocated by adherents of Position I: jurisprudential reliance on classic civil-political rights norms, as it is only to those abstract norms that litigation-appropriate duties are attached.

26. See, e.g., *Rethinking*, *supra* note 3, at 274. At their core, Positions I and III thus differ in one chief way. Each urges a *different technical basis* for advocates to rely upon in making strategic decisions about *which aspects* of their larger social justice agendas to pursue through litigation, and which to pursue through broader political advocacy tools. Position I urges a *norm-based distinction*, with civil-political rights deemed appropriate for litigation, and social rights the preferred reserve of political mobilization strategies. Position III, by contrast, urges reliance on a *claim-based distinction* predicated on system-specific justiciability doctrine that is ambivalent to norm-based distinctions in the abstract.

27. This is particularly true of the Commission. Positions I, II, and III all find support in its case-based jurisprudence, sometimes in cases resolved in the very same session. See, e.g., Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01, OEA/Ser./L/V/II.111, doc. 20 rev. ¶¶ 45-46 (2001) (finding article 26 right-to-health claim admissible, while refraining from ruling on article 4 and 5 right-to-health claims, presuming them subsumed within article 26); Milton García Fajardo et al v. Nicar., Case 11.281, Inter-Am. C.H.R., Report No. 100/01, ¶¶ 94-101 (2002) (finding labor rights of workers violated under article 26, read with articles 1 and 2, but referencing regressivity); *Five Pensioners Case*, *supra* note 1, at 60 (Commission argues before Court that state violated prohibition on regres-

The result is a jumbled, inconclusive jurisprudence, rich with inconsistencies and contradictions.²⁸ Rational social rights adjudication requires that some sense of order be found. It is within this contested context that the debate in this issue of the journal must be understood.

sivity with respect to right to social security under article 26); Jesús Manuel Naranjo Cárdenas et al. (Pensioners of the Venezuelan Aviation Company (VIASA)) v. Venezuela, Report No. 70/04, Petition 667/01, OEA/Ser.L/V/II.122, doc. 5, rev. ¶ 46 (2005) (finding article 26 right-to-social-security claim admissible on facts virtually identical to *Five Pensioners Case*); Ana Victoria Villalobos et al. v. Costa Rica, Case 12/361, Inter-Am. C.H.R., Report No. 25/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 237 (2005) (finding right-to-health claim admissible under article 26); Laura Tena Colunga v. Mexico, Petition 2582/02, Inter-Am. C.H.R., Report No. 44/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005) (finding labor rights claims admissible under article 26, dismissing claim for other reasons); Kichwa Peoples of the Sarayaku Community v. Ecuador, Petition 167/03, Inter-Am. C.H.R., Report No. 64/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005) (finding right-to-health and right-to-culture claims admissible under article 26, read with article 1 and 2 duties); Luis Rolando Cuscul Pivaral et al. v. Guat., Case 642/05, Inter-Am. C.H.R., Report No. 32/05, ¶¶ 42-44 (2006) (dismissing article 26 right-to-health claim, in favor of article 4 claim). For a full discussion of the Commission's social rights jurisprudence, see Tara J. Melish, *The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW* 50 (Malcolm Langford ed., forthcoming).

28. See Melish, *supra* note 27 at 50. Within this context, any claim that a "clear" jurisprudence on social rights and their corresponding duties is apparent in the system should be approached with a high degree of skepticism. The same inconsistencies are apparent in the Commission's approach to so-called "hybrid" petitions—i.e., those involving concurrent allegations under the Declaration and Convention—an approach which, on its face, conflicts with the plain text of article 1 of the Commission's Statute. See *Rethinking*, *supra* note 3, at 214 n.102. Compare VIASA v. Venezuela, *supra* note 27, ¶ 46 ("Article 26 of the American Convention contemplates in a generic way the protection of economic, social and cultural rights. The American Declaration in its Article XVI establishes in a specific way the right to social security [T]he Commission considers that it has competence *ratione materiae* regarding the alleged violations to the guarantee of the right to social security by virtue of Article 26 of the American Convention.") (emphasis added) with Amílcar Méndez et al. v. Argentina, Case 11.670, Inter-Am. C.H.R., Report No. 3/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 42 (2001) (recognizing competence to apply right to social security under Declaration to a state party to the Convention).

III. "SAFE GROUNDS," "HARD CHOICES," AND THE ROLE OF THE LAWYER

As outlined, Position I stands apart from Positions II and III in its a priori preference for civil-political rights norms. In their rejoinder, Cavallaro and Schaffer reaffirm their initial Position I thesis, adjusting only their rationale for it.²⁹ That is, while *Less as More* presented the norm-based preference in predominantly jurisdictional terms—with social rights characterized as “lacking concrete duties” and “grounds for state responsibility”—*Rejoinder* presents it in predominantly political-prudential terms and only with respect to article 26 of the American Convention.³⁰ *Rejoinder* sets forth three reasons for its normative preference: “possible hostile state responses,” article 26’s “non-utility,” and, ultimately, “hard choices.” None of these rationales can, however, sustain any a priori preference for civil-political rights norms nor justify avoidance of article 26.

The first argument advanced by Cavallaro and Schaffer is that, even if article 26 is, as a technical-jurisdictional matter, fully adjudicable in the inter-American system, American governments do not *believe* that it is. As such, advocates should avoid “possible hostile state responses to direct litigation of article 26” and prefer civil-political rights as the “safest” course.³¹ The chief problem with this norm-based advice, however, is that it is based on a hypothetical danger that has been empirically disconfirmed by actual state practice. Indeed, litigation invoking article 26 has been brought against a large number of American states, including Argentina, Costa Rica, the Domini-

29. They no longer argue that article 26 *can not* be adjudicated in the inter-American system for lack of concrete and enforceable duties. They now argue only that it *should not*, given speculation as to American states’ perceived understanding of its adjudicability. *Less as More*, *supra* note 4, at 225.

30. Compare *id.* at 225, 267 with *Rejoinder*, *supra* note 5, at 354 (“we challenge only the wisdom of *direct* litigation of ESC rights via article 26 before the Inter-American Court”). Cavallaro and Schaffer nonetheless continue to assert “differences in the justiciability of civil and political and economic, social and cultural rights” in the instruments and caselaw of the system. *Rejoinder*, *supra* note 5, at 351 n.15. This view raises continuing consistency problems in terms of their support of “direct approach” social rights litigation under the Declaration and Protocol, but not under the Convention.

31. *Rejoinder*, *supra* note 5, at 347-48, 361.

can Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.³² In none of these cases has the state had “hostile responses” or even questioned the exercise of the Commission and Court’s contentious jurisdiction over article 26 claims.³³ To the contrary, these states have consistently responded on the merits to such petitions, implicitly or explicitly recognizing their commitments under article 26 and even, in one case, accepting partial international responsibility for breach thereof before the Court.³⁴ Within this real-world context, it is difficult to sustain any argument that article 26 should be avoided because of American states’ *possible understanding* of article 26 as outside the jurisdictional competence of the inter-American human rights organs.

The stated rationale advanced for this possible understanding is equally unsustainable. It is justified on a single basis: the adoption in 1988 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (“San Salvador Protocol”).³⁵ That Protocol lays out the normative content of many of the social rights guaranteed in Convention article 26 in far more specific, detailed, and progressive terms than the Convention did, while also limiting the contentious jurisdiction of the inter-American organs to only two of those more extensively-defined rights: education and unionization. Cavallaro and Schaffer argue

32. See generally *supra* note 27 (for a sampling of recent article 26 cases considered by the Commission with respect to these states). For the article 26 cases argued before the Court, see *Rethinking*, *supra* note 3, at 267 n.266 and accompanying text. Lodged against the Dominican Republic, Paraguay and Peru, these latter claims have involved the rights to social security, education, health and food. The Court has recognized its contentious competence to rule on all of these claims, even while declining, in its discretion, to do so in light of the facts and arguments of the particular cases sub judice.

33. The only technical objection ever formally raised to an article 26 claim was in *Children’s Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, at 114 (Sept. 2, 2004), in which Peru raised a procedural-bar objection given that the article 26 claim was raised for the first time in Court proceedings, not having been raised in briefs or argument before the Commission. Overruled without incident on the basis of the Court’s 2000 amendments to its Rules of Procedure, the technical objection did not extend to the Court’s uncontested *ratione materiae* competence over article 26. See *id.* ¶¶ 125-27.

34. *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 204 (June 17, 2005).

35. *Rejoinder*, *supra* note 5, at 362-63.

that this Protocol-based jurisdictional limitation, by itself, evidences American states' belief that the Commission and Court lack Convention-based contentious jurisdiction over article 26.³⁶ They speculate that, given states' understanding of article 26 at the time they adopted the Protocol, states party to the Convention may be expected to be as hostile to attempts to litigate claims under article 26 as would a non-party to the Convention.³⁷

Leaving aside the fact that no state party has ever so reacted, the argument suffers from two additional flaws. First, in speculating on American states' legal understanding of the meaning and scope of discrete treaty terms, it fails to take account of American states' long-established acceptance of the 1969 Vienna Convention on the Law of Treaties and its authoritative rules on treaty interpretation.³⁸ Most notable among these is the primacy-of-the-text rule.³⁹ The text of the American Convention unambiguously extends the Commission and Court's contentious jurisdiction to all individual complaints alleging violation of "*any of the rights*" protected therein, articles 3-26 inclusive.⁴⁰ Nothing in the plain text of the Convention—or in the text of the San Salvador Protocol—raises any doubts about the inter-American organs' contentious competence over article 26 claims.⁴¹ The inter-American organs have themselves affirmed this competence in dozens of admis-

36. *Id.* at 363.

37. *Id.* at 366.

38. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

39. *Id.* art. 31. The Inter-American Court of Human Rights itself endorses this rule for interpretation of human rights treaties. See, e.g., *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 50 (Sept. 8, 1983) ("[O]bjective criteria of interpretation that look to the texts themselves are more appropriate [in the case of human rights treaties] than subjective criteria that seek to ascertain only the intent of the Parties.").

40. American Convention on Human Rights, arts. 1-2, 48, 62.3, 63.1, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1 [hereinafter American Convention].

41. It is unclear what text Cavallaro and Schaffer are reading when they assert that their view that American states will reject article 26 litigation on jurisdictional grounds is based on the "text" of the regional instruments. *Rejoinder*, *supra* note 5, at 366.

sibility decisions discussing their *ratione materiae* jurisdiction,⁴² and no American state has ever formally questioned the correctness of those decisions. It is unclear, then, why we should presume that American states—either in 1988 or today—would attach a non-ordinary meaning to the plain text of the Convention’s jurisdiction-granting provisions. Had American states in fact wished to restrict this jurisdiction in 1988, they would have done so through the Convention’s amendment procedure.⁴³

Cavallaro and Schaffer nonetheless suggest that the San Salvador Protocol should be viewed differently than other successive regional treaties that relate to the same subject matter as appears in the Convention, as it is additional to the Convention.⁴⁴ Article 30.2 of the Vienna Convention, entitled “successive treaties relating to the same subject matter,” however, makes no such distinction. It states that “[w]hen a treaty specifies that . . . it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”⁴⁵ As pointed out in *Rethinking*, this is what the San Salvador Protocol’s article 4 “savings provision” does.⁴⁶ That provision “saves” the full legal effect of the rights recognized in article 26, including their subjection to the inter-American organs’ contentious jurisdiction for states party to the Convention.⁴⁷ Within this context, the argument that American states *believe* that article 26 is non-adjudicable in the individual petitions process, and hence can be expected to have extreme or

42. See, e.g., *supra* note 27. Cavallaro and Schaffer conclude that the fact that the Court has discretionally chosen not to address directly the merits of article 26 claims presented to it since *Five Pensioners* convincingly demonstrates its belief “that article 26 simply does not provide the basis for direct access to the Court.” *Rejoinder*, *supra* note 5, at 362. This view ignores, however, the actual basis on which the article 26 claim was rejected in *Five Pensioners* as well as the fact that the admissibility of the article 26 claim in all subsequent cases was never at issue.

43. American Convention, *supra* note 40, art. 76.

44. See arguments in this regard in *Rejoinder*, *supra* note 5, at 362-64 (responding to arguments in *Rethinking*, *supra* note 3, at 230-32).

45. Vienna Convention, *supra* note 38, art. 30.2.

46. See *Rethinking*, *supra* note 3, at 232.

47. Nor can it be argued that there has been any “subsequent practice” in the Convention’s application “which establishes the agreement of the parties” that article 26 was *not* subject to the inter-American organs’ contentious jurisdiction.” Vienna Convention, *supra* note 44, art. 31.3.b.

hostile reactions to its invocation in supranational litigation, appears insupportable.

The third flaw in the Cavallaro-Schaffer "background understanding" argument is that, if taken seriously and applied consistently to all Convention-based norms, it should in fact caution against *all social rights litigation* under the Convention, including under the elements approach favored by Cavallaro and Schaffer.⁴⁸ Indeed, their argument that American states believe that article 26 is non-adjudicable is based exclusively on the fact that in 1988, when the San Salvador Protocol was drafted, "article 26 had never been employed successfully to defend ESC rights through the petitions process."⁴⁹ Yet, it is equally true that no Chapter II norm had by 1988⁵⁰ been employed successfully in the petitions process to defend economic, social and cultural rights. It would be fair to assume then, following the same logic, that American states also believed in 1988 that the inter-American organs lacked jurisdiction to construe Chapter II norms so expansively as to envelop Chapter III rights. It is unclear why states should be presumed to have changed their view on the adjudicable scope of articles 3-25 in litigating claims of rights concurrently covered in the San Salvador Protocol, but not of article 26.⁵¹ This is espe-

48. See *Less as More*, *supra* note 4, at 258.

49. *Rejoinder*, *supra* note 5, at 364.

50. The futility of this "background understanding" argument is underscored by the fact that the Inter-American Court issued its *very first* merits case in 1988. Within this context, reliance on the content of the system's case docket in 1988 to draw conclusions about states' present "understanding" of the adjudicable scope of the Convention's rights-based norms is clearly misdirected.

51. In a circular argument, Cavallaro and Schaffer conclude that "the decision by the states drafting the San Salvador Protocol to grant access to the petitions process for violations of articles 8(a) and 13 should be read to reflect the understanding by American states that . . . states ratifying the San Salvador Protocol could be made to answer to individual petitions only for violations of articles 8(a) and 13." *Rejoinder*, *supra* note 5, at 364. If they mean that states party to both the Convention and San Salvador Protocol should only have to answer to individual petitions involving the rights to unionization and education, then petitions alleging violations of the rights to health, housing, social security, food, and culture should be just as impermissible under the Convention's Chapter II norms as under its Chapter III norms. Such an interpretation would, however, put the Court's entire social rights jurisprudence into doubt. For a full analysis of this jurisprudence, see Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*,

cially true when such a view contradicts both current state practice⁵² and long-accepted rules of treaty interpretation in the region.⁵³

In addition to their “possible hostile state response” argument, Cavallaro and Schaffer offer a second prudential ground to sustain their preference for civil-political rights norms: the *non-utility* of article 26 given its substantive *overlap* with the elements approaches. When all is said and done, argue Cavallaro and Schaffer, article 26 is simply unnecessary to achieve practical gains. So why push it? They quote from my own previous writings to support the notion that similar results can “generally,” “in most cases,” and “in many ways” be achieved through reliance on article 26 or on expansive or procedural interpretations of articles 3-25.⁵⁴ This is undeniable. Yet, while there are large and important areas of overlap, that overlap is not perfect, and significant, concrete, real-world consequences follow from choosing one litigation strategy versus another. The choice of which consequences are preferable is one to be made on a case-by-case basis by those directly involved. I gave two examples in Part VI of *Rethinking* where a “direct approach,” used in conjunction with other approaches, could in fact have led to a *different* focus in supranational litiga-

in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 27. It would also mean that ratifying a protocol that aims to *expand* the scope of protected rights in the inter-American system, would in fact serve to *restrict* the scope of such rights, an unnatural and impermissible interpretation.

52. This practice is reflected in the fact that no state has ever officially questioned the Commission and Court’s contentious subject matter jurisdiction over article 26. It is indirectly supported by the fact that American states regularly adjudicate social rights claims in their internal jurisdictions. Cavallaro and Schaffer’s view that this latter fact is irrelevant to the legitimacy of direct approach litigation under article 26 in the regional system is highly curious. See *Rejoinder*, *supra* note 5, at 366.

53. See *supra* notes 38-47 and accompanying text; see also *Rethinking*, *supra* note 3, at 224-32.

54. *Rejoinder*, *supra* note 5, at 366-67 (citing PROTECTING and *Rethinking*). The authors go on to cite a cautionary note I extend to advocates in PROTECTING, a book canvassing the inter-American system’s jurisprudence through 1999, in which I advise that care be exercised when invoking article 26 as it remained jurisprudentially untested to that point. *Id.* at 357. In fact, the entirety of the system’s case-based jurisprudence on article 26 has developed post-2000, after PROTECTING was finalized. Within this context, Cavallaro and Schaffer’s citation to the dated passage in an attempt to locate inconsistency in my work is misdirected.

tion initiatives and remedial orders, shifting the focus of national and international debate in a decidedly different direction.⁵⁵ Those examples were not, as Cavallaro and Schaffer suggest, offered to insist that one approach "must" be taken or is always better than the other.⁵⁶ It was precisely to illustrate that, *because* the article 26 and integration approaches⁵⁷ are not perfect substitutes for one another, there are practical real-world implications to limiting petitioners' claims to one certain subset of norms and that those consequences, both in their rhetorical⁵⁸ and remedial implications, must be recognized.

Undoubtedly, there are vast and diverse human rights projects and social justice agendas in the Americas. These need to be respected by supranational human rights lawyers, not arbitrarily prioritized into areas of visibility and non-visibility.⁵⁹ As *Rethinking* made clear, *all* jurisdictionally-proper approaches should be placed on the table for victims and their on-the-ground partners, leaving the discretionary choice between which abstract norm or norms to use to characterize any given abuse to the determination of the litigants in each particular case, based upon their self-assessed needs, priorities, and visions of their struggle.⁶⁰

55. See *Rethinking*, *supra* note 3, at 315-24 (discussing *Corumbiara v. Brazil* and *Yean and Bosico Girls v. Dominican Republic*). Contrary to assertions in *Rejoinder*, *Rethinking* made no reference to any domestic "backlash" resulting from the *Yean and Bosico Girls* case, much less attribute it to the Court's decision not to address petitioners' right to education arguments. Compare *Rejoinder*, *supra* note 5, at 377 with *Rethinking*, *supra* note 3, at 322-23.

56. See *Rejoinder*, *supra* note 5, at 355, 374-75.

57. See *Less as More*, *supra* note 4, at 258.

58. Because rights-based litigation is generally pursued as part of broader social justice campaigns or political movements, the way legal claims are framed can have important implications for the political discourse used to legitimate and press citizen demands in larger social struggles.

59. This has historically been the practice of large, well-funded human rights organizations, such as Human Rights Watch and Amnesty International, which have tended to prioritize narrowly-construed civil-political rights at the expense of social rights protections. Under pressure from the on-the-ground groups and constituencies with which they work, these organizations are now taking a broader approach to their human rights advocacy.

60. See, e.g., *Rethinking*, *supra* note 3, at 337 ("[The strategic decision of which norm to focus upon] should attend to the articulated desires of the affected client group in terms of what they wish the 'outcome,' 'remedial

The final argument Cavallaro and Schaffer offer for their normative preference, “hard choices,” is riddled with still further contradictions. That justification, the principal one among proponents of exclusive civil-political rights reliance in the inter-American system, cites “hard choices” in a system that decides a “very limited universe of cases” per year.⁶¹ Citing numerical limits and difficult access to the system, Cavallaro and Schaffer conclude that “petitioners must rethink their understanding of the system” given that “the system cannot reasonably be viewed as capable of responding to every injustice in the Americas.”⁶² Instead, they argue, it must be used sparingly as a tool “to magnify a very, very limited universe of cases”: “*Which universe of cases, we argue, is the fundamental question.*”⁶³

In framing this view, however, Cavallaro and Schaffer get their fundamental question wrong. It is not *which* universe of cases should be adjudicated by the Court, but *who* is competent to make those decisions and on the basis of what criteria. They proceed to give examples of “real tradeoffs” that must be made in terms of selecting “vital areas of social injustice” to focus upon (e.g., a “forced eviction” versus “the killing of an indigenous leader seeking control of resources on traditional lands”), framing the question as if the answer should be clear to the reader or as if the abuses were invariably separable.⁶⁴ The Inter-American Court, in fact, expressly amended its Rules of Procedure in 2000 to ensure that it is the *victims* themselves who can make such determinations based on their *own* understanding of their cases, unlimited by the preferred characterization of their claims by the Commission or any other

focus,’ or ‘theme’ of the litigation to be and how this fits into their larger political strategy of redress.”). Cavallaro and Schaffer seem to extend their own personal experience to all social movements in the Americas. Thus, they assert that “if one is listening to these groups, one will hear a preference for focusing on those who have died in their struggles, rather than all those who, on a daily basis, suffer other rights abuses.” *Rejoinder, supra* note 5, at 382. While this is undoubtedly true for some groups, it is not so for all. All approaches and perspectives need to be respected.

61. *Rejoinder, supra* note 5, at 370.

62. *Id.*

63. *Id.* (emphasis added).

64. *Id.*

actor.⁶⁵ In one of the first cases in which these rule changes were invoked, the Court specifically upheld the litigants' right to frame their health, food, and education claims under article 26, even when they had not done so before the Commission and the Commission urged a different characterization.⁶⁶

While *some* advocates, working with *some* social movements, in *some* countries, around *particular* issues will—like Cavallaro and Schaffer in their personal experience⁶⁷—choose to rely on classic civil and political rights norms, other advocates, working with other social movements, in other countries, on distinct (or similar) issues will prefer reliance on autonomous economic, social, and cultural rights norms. Most will prefer a combination of the two, a strategy supported by the majority of social rights advocates—including this one—as a way to ensure that all aspects of abusive situations are fully addressed, *safely and effectively*.⁶⁸

The key point is that there are a plethora of available jurisdictional tools within the inter-American system for advancing social rights claims directly through litigation. There is also growing awareness that historic rights-based stereotypes are misdirected and prejudicial. Within this context, it is inappropriate to counsel victim communities, less-experienced lawyers, advocates and social movements (those who look to us for informed, neutral, technical legal assistance) away from a course, on an a priori basis, that is not only jurisdictionally

65. Rules of Procedure, Inter-Am. Ct. H.R. (ser. C), art. 23 (Nov. 25, 2003) (granting *locus standi in judicio* to victims and their representatives in all stages of contentious procedure before the Court).

66. See *Case of Children's Rehabilitation*, *supra* note 33. Incidentally, given the generality of the claims and available evidence, I did not advocate extending the arguments to article 26 in this particular case and believe the Court correctly limited its holding to articles 4 and 5. If more specific evidence had been attained to substantiate the article 26 claims, this assessment may have been different.

67. *Rejoinder*, *supra* note 5, at 372-79 (discussing personal experience in Brazil).

68. See, e.g., PROTECTING, *supra* note 18, at 117-21, 346-47 (urging litigants to rely on combination of approaches, including "integration approach," "indirect approach," "article 26 approach" and "complex violations approach"); *Rethinking*, *supra* note 3, at 337 (highlighting that all these approaches "have their strengths and weaknesses in distinct factual contexts, and are generally most effect when used in conjunction. None should be privileged a priori over others").

proper but that the affected actors *themselves* believe is the best way to promote “social justice” on the ground for themselves.⁶⁹ That is, this debate has nothing to do with promoting “sterile” and “detached” jurisprudence or justiciability “in a vacuum.”⁷⁰ Nor is it about privileging “justice” over “justiciability” or “justiciability” over “justice,” a nonsensical distinction when discussing case-based adjudication. It is about ensuring that local communities have the *full set* of tools available to them for challenging and vindicating the social rights abuses they experience and thereby allowing *them*—not those who purport to decide what the most “highly visible issues” are or how violation-specific “tradeoffs” should be made⁷¹—to make the discretionary choice, on a case-by-case basis, on the strategy they wish to employ to respond to their own reality.

Like their “possible hostile state reaction” argument, the “hard choices” or “tradeoff” argument advanced by Cavallaro and Schaffer also raises significant internal contradictions in their larger thesis. This is true not only with respect to their “listening to social movements” argument, but also with respect to the elements approach itself. That approach, in its two primary versions,⁷² limits neither the *number* of cases brought to the system nor the *types* of abuses litigated there. Indeed, it is theorized on precisely the contrary notion: that the *universe of cases* need not be limited, but rather only the *technical legal norms* invoked in litigating them need be (i.e., preferring Chapter II norms over Chapter III norms). Forced evictions, social security discrimination, negligent medical care, and forced sterilization may all be litigated, in principle,

69. This is particularly true when, as Cavallaro and Schaffer recognize, “[i]n practice, social movements are often more interested in the Court as an avenue for raising the profile of particular agendas” *Rejoinder*, *supra* note 5, at 370.

70. Cavallaro and Schaffer repeatedly characterize the aims of those who support direct litigation of social rights in this unhelpful way. See, e.g., *Rejoinder*, *supra* note 5, at 345-46, 367; *Less as More*, *supra* note 4, at 219.

71. *Rejoinder*, *supra* note 5, at 355 n.26 (“[W]e argue that the Court is most effective when it allows *highly visible issues* to be addressed before an international adjudication body.”) (emphasis added).

72. See *Less as More*, *supra* note 4, at 258; *Rethinking*, *supra* note 3, at 193-96 (distinguishing between elements approaches “I,” “II,” and “III,” with the latter two approaches corresponding to the “integration” and “indirect” approaches). The two primary versions refer to elements approaches II and III.

under Chapter II or Chapter III norms. In this sense, preferring one set of norms over another does not, by itself, limit "the universe of cases" presented to the Court. It is not clear, then, what "tradeoffs" are to be made and how they are to be chosen.

Cavallaro and Schaffer's emphasis on deaths or killings may indicate that this is their chosen focus.⁷³ Yet, if the goal is only to focus the "universe of cases" presented to the Court on deaths as the "most visible" claims, then there is no need to refrain from invoking article 26. Indeed, the *type* of abuses litigated before the inter-American system is not directly tied to the abstract legal norm upon which an advocate might rely. The "killing of an indigenous leader seeking control of resources on traditional lands," for example, can be litigated under the Convention as a breach of the right to life, to property, to housing, to culture, to political participation, or to freedom of expression, among others. Most litigants will choose to frame the violation as a variety of these norms. Raising the "housing rights" or "cultural rights" claims in this one single case does not burden the system any more than the raising of the "life," "expression," "participation," or "property" claims. It is not, therefore, clear how avoiding article 26 in litigation before the Court will limit the "universe of cases" heard there.

The better approach to defining the cases pressed upon the Court is, as *Rethinking* argues, to distinguish not between *norms* in the abstract but between *claims* that satisfy and those that fail to satisfy the core system-specific elements of a justiciable controversy.⁷⁴ That is, in the inter-American system, claims

73. Alternatively, it might imply that they advocate exclusive reliance on the narrowest elements approach "I," in which civil-political rights are construed narrowly, at least before the Court. But does this also extend to other narrowly-construed civil-political rights norms? Are narrow cases implicating the right to vote, the right to political participation, or the right to free expression necessarily more "important" or "visible" in the Americas than those involving housing rights, social security, access to health treatments, or unjustified school dismissals? Again, *who* is to decide? On the basis of what criteria?

74. See, e.g., *Rethinking*, *supra* note 3, at 334 ("The first strategic decision to be made, therefore, involves the identification of the *contours of the controversy* to be litigated. That determination, in turn, requires identification of the conduct upon which state responsibility is allegedly based and identification of the alleged victim.").

must be framed in a manner that allows the Court, first, to find *concrete injury* to an individual's protected right and, second, to impute responsibility for that injury to the state through breach of a *conduct-based duty* held to the alleged victim. These jurisdictional boundaries themselves substantially limit the universe of cases that may be brought to the system's adjudicatory function. They do so by restricting the system docket to the types of abuses for which states may legitimately be held legally responsible under supranational contentious process in individual complaints procedures, excluding claims that, like many of Cavallaro and Schaffer's recommended test cases, surpass the system's adjudicatory limits. Once such a justiciable claim has been identified, the strategic choice of whether to frame it under classic civil-political rights norms, classic social rights norms, or a mixture of the two is entirely up to the litigants themselves.⁷⁵

In this regard, it is important to clarify what *Rethinking* in fact said about the right to life as a case-framing mechanism. *Rethinking* did not in any way question the ordinary use of the right-to-life norm in social rights litigation.⁷⁶ What was questioned was the strategy of using physiological *death* as a case-defining mechanism in one particular set of non-custodial cases privileged by Cavallaro and Schaffer in their hypothetical test-cases⁷⁷: those in which state responsibility "is predicated not on direct acts . . . but on *omissions in the provision of goods or services*."⁷⁸ In these particular cases, while using death as a case-defining frame makes evidentiary sense in terms of proving concrete individual injury, it makes less sense for establishing causal conduct, and hence for allowing the adjudicatory body to impute legal responsibility for the claimed injury to the state.⁷⁹ This was demonstrated by the *Yakye Axa* case cited

75. *Id.* at 335-37.

76. My writing and advocacy has consistently promoted this approach. See, e.g., PROTECTING, *supra* note 18, at 238-58 (discussing use of Convention article 4 under an "integration approach" to effectively protect social rights). *Rethinking* did question the *overuse* of Convention article 4 under Position I to frame all claims related to housing, health, food, water, social security, land, and education, given limits to the elasticity of the norm and problems of norm dilution. *Rethinking*, *supra* note 3, at 323-327.

77. See *Less as More*, *supra* note 4, at 276-80.

78. *Rethinking*, *supra* note 3, at 301.

79. *Id.* at 301-02.

in *Rethinking*, in which the Court dismissed for *insufficient proof of causation* the narrow physiological death claim urged by litigants, while accepting the broader right-to-a-dignified-life claim, for which the burden of causal proof was less rigorous.⁸⁰ *Rethinking* thus suggested that given the particular theory of state responsibility at issue, reliance on the broader right to a dignified life or the right to health, as a matter of justiciability doctrine, would have been a *safer* litigation route.⁸¹

Neither did *Rethinking* question the standard of state responsibility articulated by the Court in *Sawhoyamaxa* for the right-to-life claim at issue there. To the contrary, it indicated that the Court articulated the *correct* standard, one corresponding directly to quadrant 1 duties. Error arose only in the Court's *application* of this correct legal standard to the factual circumstances of two sets of victims, for whom no individualized assessment of causal responsibility was offered.⁸²

The point to underscore here is that, once proper subject-matter jurisdiction is assured,⁸³ *norm*-based distinctions simply are not helpful in supranational litigation in the Americas. If we want to take the *safest and most effective* approach to social rights litigation—one that best assures the success of our litigation initiatives in the regional system and hence their usefulness to larger social justice strategies—we need to focus on *claim*-based justiciability and how it intersects with theories of state responsibility and litigant access to the adjudicatory function. While it is generally advisable, within this context, to advance claims under a variety of approaches (argued conjunc-

80. *Id.*

81. *Id.* at 302 ("The lesson to be taken is that, where omissions in the provision of goods and services are being challenged, evidentiary requirements associated with causation in fact favor 'integration' or 'direct' approaches over the narrowest 'elements' one (focused on discrete physiological deaths) that Cavallaro and Schaffer privilege in their case-based hypotheticals."). *Ximenes Lopes* involved a custodial death.

82. *See id.* at 302 n.372 (referring to children and to elders approaching or exceeding average life expectancy). *Rejoinder* offers a very different assessment of what was said in *Rethinking*. *See Rejoinder, supra* note 5, at 381-82.

83. Cavallaro and Schaffer continue to assert the technical *ratione materiae* error that "hybrid complaints"—those that concurrently invoke provisions of the Declaration and Convention in the same petition—are jurisdictionally proper in the inter-American system. *See Rejoinder, supra* note 5, at 357 n.32.

tively or in the alternative),⁸⁴ a priori preferences for any particular set of substantive or procedural norms should always be avoided.

IV. THE "IS" AND THE "OUGHT" IN SUPRANATIONAL LITIGATION: ACCOMMODATION VS. CORRECTION

The norm-based disagreement will never fully be resolved until the obligations disagreement is addressed. Indeed, as all participants in this debate agree, it is the obligations question that lies at the heart of any a priori preference for civil-political rights norms in supranational litigation of economic, social, and cultural rights violations. The disputed question is whether the legal obligations that attach to one "set" of rights should properly be recognized as *differing* in judicially cognizable ways from those that attach to the other "set," as Positions I and II assume (even while recognizing that both possess "negative" and "positive" aspects), or whether they are precisely the same, with distinct dimensions applied more prominently in distinct supervisory settings, as Position III assumes.

Cavallaro and Schaffer frame our disagreement on this as an "is" versus "ought" debate between Positions I and III—as a schism between the "actual caselaw" and what we *do* as practitioners, on the one hand, and what we *think* as academics and urge that the Court "should do," on the other.⁸⁵ Both predicates to this perspective are nonetheless questionable. First, there is not at this stage any assertable "is" in the system's approach to article 26, which is so fraught with contradictions that support can currently be found for Positions I, II, and III alike.⁸⁶ To the contrary, it is highly open terrain in which the Court in particular is seeking greater clarity and consensus before setting forth a specific position of its own.

It is important in this regard to clarify what the Court did and did not do in *Five Pensioners*, a case argued under a Position II "prohibition on regressivity" theory of state responsibility and the only case in which any article 26-specific standards have been articulated under its caselaw. Cavallaro and Schaffer read the case as evidence of the judges' belief "that article

84. See, e.g., *Rethinking*, *supra* note 3, at 205-06, 313, 337; *PROTECTING*, *supra* note 18, at 117-21, 346-47.

85. *Rejoinder*, *supra* note 5, at 354-55, 371, 383.

86. See generally *supra* notes 27-28.

26 simply does not provide the basis for direct access to the Court,"⁸⁷ dismissing as unconvincing any narrower interpretation that distinguishes the distinct *claims* framed by litigants under article 26 from the *norm* itself.⁸⁸ They thus ignore the underlying reasons why the specific article 26 claim advanced in *Five Pensioners* was non-cognizable, fixating instead on the abstract norm-based end result. The Court, by its clear language, did not reject article 26 as a cognizable rights-based norm; it rejected only the attempt of individual victims to assert a particular type of claim under it: "the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of [a contentious] case."⁸⁹

The Court's refusal to accede to this jurisdictionally improper request does not speak to the viability of *properly-framed* claims advanced under article 26, claims the Court will have to consider on a case-by-case basis and in line with its long-established jurisdictional parameters. This was underscored by the Court's current President, Judge Sergio García Ramírez, in his concurring opinion. While reasserting that the Court was not able to advance in interpreting article 26 in the context of the particular case sub judice, "given its peculiarities,"⁹⁰ he stated clearly his understanding that "*the Court will be able to examine this relevant issue in the future.*"⁹¹

In this line, Judge García Ramírez proceeded to underscore three critical points for future litigants to keep in mind

87. *Rejoinder*, *supra* note 5, at 363.

88. *Id.* at 356-63, 360 ("[F]ar from suggesting that there are two 'types' of article 26 claims—one justiciable and the other not—the more natural reading of this [*Five Pensioners*] passage supports the view that article 26 does not recognize individual, immediately-justiciable rights.")

89. *Five Pensioners Case*, *supra* note 1, at 62 ("reject[ing] the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case") (emphasis added).

90. *Id.* The "peculiarities" of the case were that the alleged victims were five wealthy men receiving disproportionately generous pension benefits in a country characterized by a grossly inequitable pension regime. Given appropriate balancing requirements between their individual rights and the rights of others in a democratic society they had a very weak case under article 26, as individual claimants. Within this context, the Court appears to have preferred to reject the non-cognizable quadrant 4 claim altogether, avoiding thereby an adverse merits-based decision in its first article 26 case, rather than reframe it *sua sponte* under cognizable quadrant 1 standards.

91. *Five Pensioners Case*, *supra* note 1 (García Ramírez, J., concurring) (emphasis added).

when framing article 26 cases. First, article 26 is a *rights-based norm*; it is not merely a programmatic obligations clause unhinged from corresponding rights-holders.⁹² Second, the “individual dimension” of the rights in article 26 (not the “collective” one focused on in the judgment’s dictum) grounds their “justiciability.”⁹³ Third, in resolving future case-based petitions involving article 26 claims, the Court will focus on assessing, on a case-by-case basis, both the existence of the *individual* right at issue and the state’s compliance with the duties corresponding to that right.⁹⁴ In other words, article 26, as a Convention-based jurisdictional norm, is the repository of a variety of discrete rights,⁹⁵ each of which the Court must interpret in its individual dimension for purposes of establishing state responsibility in contentious contexts. Because the Court itself had declined to address the “individual dimension” of the rights in article 26 in the context of the case before it (reserving its limited comments to a terse dictum⁹⁶ on the “collective

92. *Id.*

93. *Id.*

94. *Id.*

95. *Rejoinder’s* claim that the contrary view finds support in article 26’s failure to “establish the particular rights with reference to the rights holder or in language that proscribes particular state behavior,” *Rejoinder*, *supra* note 5, at 361 n.42, neglects the fact that article 26 serves as a jurisdictional basis for regionally protecting the rights derived from the norms of the *OAS Charter*, provisions which *do* establish the particular rights in this way.

96. Cavallaro and Schaffer make much ado of the characterization of the Court’s *Five Pensioners* statement on article 26 as obiter dictum, denominating it an attempt to mischaracterize and obviate the true import of the Court’s statement. See *Rejoinder*, *supra* note 5, at 357-63. Far more mundanely, the characterization is simply a descriptive reference to the fact that the Court rejected the request to rule on the particular article 26 claim urged upon it, and hence anything said abstractly about that claim (i.e., the one it did not consider for purposes of deciding the case) is, by definition, obiter dictum. See BLACK’S LAW DICTIONARY 1072 (6th ed. 1990) (defining term). While undoubtedly true that the Court frequently speaks in obiter in its opinions, it makes no pretention that such statements constitute binding regional law. Rather, the Court speaks in broad language to nudge domestic law in more expansive directions or to test potential new directions the Court is not yet, absent greater consideration, prepared to affirm in its case-based jurisprudence. This is how the Court developed its “life project” jurisprudence under article 4—articulating the idea first as obiter in the 1999 *Street Children Case*, then in a set of advisory opinions, until finally—in 2004—on the merits in *Panchito López*. See Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, in SOCIAL RIGHTS JURISPRUDENCE, *supra*

dimension" of those rights), the judge declined, appropriately, to elaborate further on these important issues. That is, he did not identify the full spectrum of "individual rights" covered under article 26. Nor did he indicate the precise nature of the legal obligations that correspond to those rights in adjudicatory contexts, other than to affirm that they must, as a function of their justiciability, be interpreted in their individual dimension.

Judge García Ramírez's concurring opinion provides critical guidance for advocates as they consider litigation strategies before the Court. At a minimum, it undermines Cavallaro and Schaffer's claim that the "natural reading" of *Five Pensioners* is that "article 26 does not recognize individual, immediately-justiciable rights."⁹⁷ More naturally, the Court's decision reflects the view that article 26, like all rights-based norms, may give rise to a variety of justiciable and non-justiciable claims. It further reflects an initial assessment by the Court that among the set of non-justiciable claims are those in which state responsibility is predicated on alleged "regressivity" in rights enjoyment, either for an individual (quadrant 2) or the collective (quadrants 3 and 4). Indeed, litigants and amici in *Five Pensioners* raised each of these claims under article 26, and the Court recognized none of them. By contrast, the one claim not advanced by litigants and amici under article 26—the same claim successfully adjudicated under article 21—was a standard quadrant 1 claim.

Five Pensioners thus tells us at once quite little and quite a lot about article 26. Left unmistakable, however, is the Court's

note 27. Within this context, the Court's decision not to cite its *Five Pensioners* dictum—either again as dicta or as a new case holding—in any of its subsequent cases in which article 26 claims have been presented for decision speaks volumes to the Court's discomfort with the language. Attempts to find alternative meaning in this silence cannot be squared with Court practice, in which generally-supported obiter is regularly recited in subsequent decisions. Compare *Rethinking*, *supra* note 3, at 267 n. 266 with *Rejoinder*, *supra* note 5, at 362-64.

97. *Rejoinder*, *supra* note 5, at 361. Cavallaro and Schaffer do not in fact provide any affirmative arguments in defense of this "natural reading." They appear to prefer to direct their attention exclusively to my prior writings on the case, taking phrases out of context and representing them for precisely the propositions they aimed to counteract, in an attempt to show that I shared their reading. See *id.* at 362. Readers are invited to review the texts for themselves. See, e.g., Melish, *A Pyrrhic Victory*, *infra* note 98.

openness to considering future claims under article 26, provided they are “correctly” framed. Where advocates of Positions II and III differ is in how we define “correct framing.”⁹⁸

Within this context, and seeing dangers in the duty-based exceptionalism of Positions I and II, *Rethinking* seeks to draw the Court not into new and uncharted waters, but rather safely back into the protective harbor of its long-standing caselaw on state responsibility in adjudicatory contexts.⁹⁹ That is, unlike Positions I and II, it urges the Court *not* to depart from its system-specific caselaw by applying novel doctrines and typologies to one set of abstract norms. Rather, it encourages the Court to apply the *same standards* to direct-approach social rights claims that it has applied to all other human rights claims since articulating its now stock grounds for state responsibility in its very first case, *Velásquez Rodríguez*, in 1988.¹⁰⁰ The

98. Advocates of Position II urge litigants to continue to bring the same progressive development/prohibition on regressivity (quadrant 4/2) claims advanced in *Five Pensioners*, but with better victims—i.e., those “representative” of the “prevailing situation” in a country. See Christian Courtis, *La Protección de los Derechos Económicos, Sociales y Culturales a Través del Artículo 26 de la Convención Americana sobre Derechos Humanos*, in PROTECCIÓN INTERNACIONAL DE DERECHOS HUMANOS: NUEVOS DESAFÍOS 57 (2005) (urging litigants, when invoking article 26, to meet an additional burden of “demonstrating the collective relevance of the claim”). Advocates of Position III, by contrast, assert that such a heightened standing rule for article 26 claims offends core human rights principles, including equal protection of the law, and urges litigants to apply quadrant 1 standards—those the Court has applied consistently for two decades—to all human rights claims. See Tara J. Melish, *A Pyrrhic Victory for Peru’s Pensioners: Pensions, Property, and the Perversion of Progressivity*, I(1) CEJIL JOURNAL: DEBATES ON HUM. RTS. & INTER-AM Sys., Dec. 2005, at 51, 59.

99. Cavallaro and Schaffer may thus have their “is” and “ought” reversed. The four quadrant framework was developed precisely to reflect current *inter-American* justiciability doctrine. While it is equally applicable to other supranational systems that define justiciability similarly—as most do—Cavallaro and Schaffer’s attempt to reserve it *only* for future United Nations adjudicatory mechanisms appears to miss its point. *Rejoinder*, *supra* note 5, at 354-55, 383.

100. In discussing *Velásquez Rodríguez*, Cavallaro and Schaffer misread the Court’s holding and improperly characterize the Court’s principal findings on state responsibility as unnecessary obiter dictum. *Rejoinder*, *supra* note 5, at 360-61. Precisely because there was no *direct evidence* that state agents were responsible for Manfredo Velásquez Rodríguez’s disappearance and death, the Court relied on the Commission’s “practice or pattern” theory, together with the fact that the victim was last seen in the hands of the state, to impute causal responsibility to the state. This was the *holding* of the case. The por-

Court's caselaw has consistently grounded state responsibility in the familiar duty, of a conduct-based, individual-oriented nature, to take all appropriate measures to respect and ensure the rights of individuals within the state's jurisdiction. Position III asks the Court to do no more than to continue to apply this system standard to *all* rights-based claims under the Convention, not only to those framed under Chapter II norms. That is, it urges the Court to remain safely within quadrant 1, where it has comfortably adjudicated over the last two decades, in assessing state responsibility for all concrete rights-based harms, avoiding litigant arguments that ask it to cross over into quadrants 2, 3, and 4 when dealing with "social rights." These quadrants are incapable of assessing state responsibility within the limits of system-specific justiciability doctrine and hence reliance upon them in adjudicatory contexts will continue to lead to the rejection of associated claims.

The second questionable predicate to the "is" versus "ought" distinction highlighted in *Rejoinder* relates to its assumption that responsible lawyering is about hewing at all times to the "is" of a system's caselaw,¹⁰¹ even in recognition that it has a flawed basis. To the contrary, responsible lawyering is fundamentally about identifying the "ought" and finding ways to guide the decisionmaker toward that end in a way that is non-prejudicial to any particular case sub judice or to the system's larger jurisprudence as a whole. *Rethinking* and Position III aim in this direction. They urge adoption of a course that stays true to the system's longstanding jurisprudence, while ensuring the system's rational, sustainable, and effective treatment of all guaranteed rights over the long-term. Whether responding to statements of case-based precedent or obiter dictum, our duty—as lawyers, advocates, and academics—is to critique, question, and thoroughly unpack anything we find inconsistent or deficient in judicial reasoning, rather

tion of the judgment cited by Cavallaro and Schaffer at n.40 refers to an *alternative* basis for state responsibility: the state's failure to take appropriate measures to *respond* with due diligence to the disappearance once it occurred, irrespective of who was directly responsible.

101. One's appreciation of the "is" of the system's "actual caselaw and instruments" depends, however, on how one defines what one is looking at. By focusing different levels of attention on *norms* versus *claims*, Positions I, II and III all claim to be applying the system's "is."

than passively accommodating our strategies to stereotypes or precedents we know to be misdirected.

V. THE "SAFEST" COURSE: NORMATIVE NEUTRALITY
AND TECHNICAL PRECISION

The core of this debate comes down to a single question: Whether we, as experienced lawyers operating in the system, should affirmatively promote the view to the communities and social movements with which we work—and that look to us for neutral, technically-precise legal assistance in waging their own on-the-ground struggles—that direct litigation of economic, social, and cultural rights is "suspect" or that certain guaranteed norms, such as article 26, should a priori be avoided?¹⁰²

Cavallaro and Schaffer answer this question in the affirmative. They argue that "achieving justice" on the ground requires sticking with tried-and-true civil and political rights and claim that those who do not follow this course, at least before the Court, are only interested in detached or abstract justiciability. This view ignores, however, the vast and ever-changing diversity of social movements in the Americas, the chorus of voices clamoring to be heard in a system traditionally dominated by a narrow set of civil-political claims, the broad jurisdictional protections for economic, social, and cultural rights in the regional system, and American states' increasingly robust embrace of social rights and social rights litigation. It also neglects the fact that norm-based subject-matter jurisdiction and claim-based justiciability are two entirely different things. Within this context, the *safest and most effective* course for rights advocates in the Americas today is not to artificially limit litigation to one certain set of jurisdictionally-proper norms. This guarantees neither "justice" nor "justiciability." Rather, it is precisely to privilege normative neutrality and technical precision in the framing of *all* human rights litigation, through proper attention to claim-based justiciability and a genuine embrace of the wishes, visions, priorities, and social justice agendas of the communities with which we work, whatever these may be.

102. See, e.g., *Less as More*, *supra* note 4, at 268-70.

